Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ADOLFO V. SAENZ,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C03-4041-MWB

MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the court pursuant to Magistrate Judge Paul A. Zoss's Report and Recommendation. (Doc. No. 11). Judge Zoss concluded that the Administrative Law Judge (ALJ) failed to properly consider the opinion of David Faldmo, a physicians' assistant, who was also a "treating source." Report and Recommendation, Doc. No. 11 at 24. In addition, Judge Zoss found that the ALJ failed to properly conduct a *Polaski* analysis. Judge Zoss recommends this case be reversed and this action be remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g), with directions to properly consider Faldmo's opinion and also to conduct a proper *Polaski* analysis. No party has filed timely objections to the Report and Recommendation.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, in this case, no party has filed a timely objection and no request for an extension of time to do so has been filed. Thus, the court concludes *de novo* review — required under the plain language of the statute only for "those portions of the report or specified proposed findings or recommendations to which objection is made," 28 U.S.C. § 636(b)(1) — is not required here, and the court will instead review only for plain error. *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir.1994) (reviewing factual findings for plain error where no objections to magistrate judge's report were filed).

The court has reviewed the record and agrees with Judge Zoss that this case should be remanded. One of the reasons for the remand, identified by Judge Zoss, was the ALJ's failure to give the proper weight to Faldmo's opinion, a treating source, who was a physicians' assistant.[1] Judge Zoss recommends this case be reversed and this action be remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g), with directions to properly consider Faldmo's opinion. Although this court agrees with Judge Zoss that the ALJ erred in failing to properly consider Faldmo's opinion, this error was

[1] "A treating source is an acceptable medical source who provides the claimant 'with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with [the claimant].' 20 C.F.R. § 404.1502. Dr. Herrera, who examined Saenz on one occasion, clearly was not a treating source, whereas P.A. Faldmo was." (Report and Recommendation, Doc. No. 11 at 24).

not because Faldmo's opinion should have been given greater weight because it was the opinion of a treating source. Instead, the court finds that the ALJ failed to properly consider Faldmo's opinion as an "other medical source opinion."

The regulations define "treating source" as:

> Treating source means your own physician, psychologist, or other *acceptable medical source* who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with an acceptable medical source when the medical evidence establishes that you see, or have seen, the source with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s). We may consider an acceptable medical source who has treated or evaluated you only a few times or only after long intervals (e.g., twice a year) to be your treating source if the nature and frequency of the treatment or evaluation is typical for your condition(s). We will not consider an acceptable medical source to be your treating source if your relationship with the source is not based on your medical need for treatment or evaluation, but solely on your need to obtain a report in support of your claim for disability. In such a case, we will consider the acceptable medical source to be a nontreating source.

20 C.F.R. § 404.1502 (*emphasis added*). Specifically, the Social Security Administration has clarified the language of the regulations stating that only an "acceptable medical source" can be considered to be a treating source for purposes of giving controlling weight to a treating source's medical opinion. In most circumstances, controlling weight is to be given to an "acceptable medical source" who is also a "treating source." The regulations distinguish between an "acceptable medical source" and an "other medical source." *See* 20 C.F.R. §§ 404.1513(a). The regulation expressly states:

> We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s). See § 404.1508. Acceptable medical sources are–
> (1) Licensed physicians (medical or osteopathic doctors);
> (2) Licensed or certified psychologists. Included are school psychologists, or other licensed or certified individuals with other titles who perform the same function as a school psychologist in a school setting, for purposes of establishing mental retardation, learning disabilities, and borderline intellectual functioning only;
> (3) Licensed optometrists, for the measurement of visual acuity and visual fields (we may need a report from a physician to determine other aspects of eye diseases);
> (4) Licensed podiatrists, for purposes of establishing impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle; and
> (5) Qualified speech-language pathologists, for purposes of establishing speech or language impairments only. For this source, "qualified" means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of Clinical Competence from the American Speech-Language-Hearing Association.

20 C.F.R. 404.1315(a). Other sources are defined as:

> (d) Other sources. In addition to evidence from the acceptable medical sources listed in paragraph (a) of this section, we may also use evidence from other sources to show the severity of your impairment(s) and how it affects your ability to work. Other sources include, but are not limited to—
> (1) Medical sources not listed in paragraph (a) of this section (for example, nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists);
> (2) Educational personnel (for example, school teachers,

> counselors, early intervention team members, developmental center workers, and daycare center workers);
> (3) Public and private social welfare agency personnel; and
> (4) Other non-medical sources (for example, spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and clergy).

20 C.F.R. 404.1413(d). Under the regulations, Faldmo, a physicians' assistant, would be an "other medical source" but not a treating source since he is not an "acceptable medical source." The ALJ erred because he failed to properly consider Faldmo's "other medical source" opinion. The ALJ is required to conduct an evaluation of "other medical source" opinions pursuant to several factors that are enumerated and defined in the regulations.[2]

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[2] "(d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

> (1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.
> (2) Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion

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> controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.
>
> > (i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.
> >
> > (ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable

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> knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(3) Supportability. The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.

(4) Consistency. Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

(5) Specialization. We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.

(6) Other factors. When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

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Shontos v. Barnhart, 328 F.3d 418, 425 (8th Cir. 2003) (stating "[t]he amount of weight given to a medical opinion is to be governed by a number of factors including the examining relationship, the treatment relationship, consistency, specialization, and other factors"). The ALJ erred by simply dismissing Faldmo's opinion, stating, "Faldmo is not considered an acceptable medical source, the undersigned has given little weight to his opinions." This dismissive statement by the ALJ does not meet the regulatory requirement when considering the opinions of an "other medical source." An ALJ "is not free to disregard the opinions of [other] health providers simply because they are not medical doctors." *Duncan v. Barnhart*, 2004 WL 936686 *2 (8th Cir. 2004). The Eighth Circuit Court of Appeals has held that an ALJ should not ignore the opinions of "other" non-physician medical sources but should consider these opinions to assess the severity of an impairment, stating:

> The amount of weight given to a medical opinion is to be governed by a number of factors including the examining relationship, the treatment relationship, consistency, specialization, and other factors. Generally, more weight is given to opinions of sources who have treated a claimant, and to those who are treating sources.

Shontos v. Barnhart, 328 F.3d 418, 426 (8th Cir. 2003). In this case, the ALJ has failed to properly evaluate Faldmo's "other medical source" opinion with the factors provided by the regulations. Faldmo had a long-term treating relationship with Saenz. He treated Saenz, almost monthly, from January 31, 2001 through February 18, 2002. (R. at 287-293, 295-308, 311-322, 328-329, 348-352). Faldmo's opinion, although not a "treating source's opinion," was not properly considered by the ALJ. Additionally, the court agrees

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20 C.F.R. 404.1527(d).

with Judge Zoss's conclusion that the ALJ failed to conduct a proper *Polaski* analysis. Although the ALJ stated that a *Polaski* analysis must be conducted, he failed to provide sufficient analysis and consideration as to the *Polaski* factors.

With the one exception, as noted above, the court finds no error and accepts the Report and Recommendation. Therefore, pursuant to Judge Zoss's recommendation, this case is **reversed and this action is remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 406(g)**, with directions to consider Faldmo's opinion in accordance with the regulations and to conduct a proper *Polaski* analysis.

IT IS SO ORDERED.

DATED this 2nd day of June, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA